

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 24

ALTERNATE CONCEPTS, INC.

Employer

and

UNION DE TRONQUISTAS DE PUERTO
RICO, LOCAL 901, IBT

Petitioner

Case 24-RC-8496

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, hereinafter the Act, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board¹. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned².

¹Upon the entire record in this proceeding, the undersigned finds:

a. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

b. Alternate Concepts, Inc., a Massachusetts corporation authorized to conduct business in the Commonwealth of Puerto Rico, is engaged in the operation of an urban commuter rail system. During the past twelve-months, a representative period, it purchased and received goods and materials valued in excess of \$50,000 from points and places located outside of the Commonwealth of Puerto Rico. During the same period of time, it derived gross revenues in excess of \$250,000.

c. The parties stipulated, and I find, that Alternate Concepts, Inc., is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

d. Unión de Tronquistas de Puerto Rico, Local 901, hereinafter the Petitioner, is a labor organization within the meaning of Section 2(5) of the Act.

e. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(b) and Section 2(6) and (7) of the Act.

²The Employer filed a Brief, which has been considered.

I. The Petitioned For Bargaining Unit

The Unión de Tronquistas de Puerto Rico, Local 901, IBT, hereinafter the Petitioner, seeks to represent those employees working for Alternate Concepts, Inc., hereinafter the Employer or ACI, in the following bargaining unit³:

Included: All full time and part time station officials employed by the Employer at its stations located at San Juan, Bayamón and Guaynabo, Puerto Rico.

Excluded: All other employees, guards and supervisors as defined in the Act.

The Employer, contrary to the Petitioner, contends that the unit is inappropriate and the Petition should be dismissed as station officials are supervisors within the meaning of Section 2(11) of the Act.

II. The Employer's Operations

The Employer operates an urban commuter rail system known as the "Tren Urbano" connecting the San Juan, Bayamón and Guaynabo municipalities in Puerto Rico. The "Tren Urbano" system consists of a mass transit rail line seventeen kilometers in length, which runs from Bayamón to San Juan. There are 16 train stations. They are organized into 11 business units, depending on the number of passengers a particular train station supports.

The Employer is part of the Siemens Transportation team⁴ which contracted with the Puerto Rico Highway Transportation Authority (hereinafter PRHTA) to support all testing processes of the construction carried out by the Siemens Company, to develop pre-revenue service and, in its second phase of operation, to be in charge of all operational and maintenance aspects of the train for a contract period of five years with an option for five additional years. The PRHTA controls the entire organizational process performed by the Employer, and pays it a monthly lump sum to fulfill all operational and maintenance tasks of the train system.

The record evidence shows that the General Manager is Rodolfo González, the top ranked official, to whom Human Resources Manager Florencio Polanco reports directly. Only General Manager Rodolfo González or Human Resources Manager Florencio Polanco is vested with the authority to hire, fire, lay-off and recall employees. There are two distinct areas within ACI Operations, the Operations and the Station Departments. The Operations Department is responsible for all transportation operations. This area is overseen by Mike

³The unit appears as amended at the hearing.

⁴The Siemens Transportation team is composed of Alternate Concepts, Inc., Siemens Company and a company identified in the record as Quantrikena and Associates.

Francis, Manager of Operations and by Pedro Adorno, Assistant Manager of Operations. Five Station Officials and 51 train operators are assigned to the Operations Department. These five Station Officials oversee the Train Operators in matters such as discipline, payroll, vacancy requests and coverage, training requests, compliance with uniform directives, client handling and enforcing other company policies. In addition, these five Station Officials are responsible for the train yard security by conducting security checks to the trains during pull in and pull out from the yard.

The Stations Department or area (as occasionally referred to in the record) is responsible for the management of the train stations. Grisel Cruz and John Velez are the Assistant Manager and Alternate Assistant Manager, respectively, for the Stations Department. Prior to their designation as Assistant Managers on October 2005, both were Transportation Supervisors. Their office is located within the ACI main facilities building which is adjacent to the Martínez Nadal train station. There are 39 Station Officials and 118 station attendants assigned to the Stations area⁵. The Station area is further divided into two sections, the Special Operations Evaluation Team section, which is managed by two Station Officials, and the Administrative section, which is also run by two Station Officials. The Special Operations Evaluation Team provides technical support, quality control and training to Station Officials, and the Administrative Section provides administrative support to the Station Officials at the stations.

The record reflects that the Station Officials assigned to the Stations area are responsible for, under normal conditions, Station Attendants' compliance with uniform requirements, safety measures in the booths, and correct treatment of clients. The Station Officials oversee security and maintenance contractors' personnel⁶ and request any needed repairs to the train station facilities. In addition, Station Officials must attend to any incidents occurring at the stations, for example, people trapped in elevators or clients falling off the stairs. Under abnormal or extraordinary situations, Station Officials are to carry out all operational tasks such as commanding the trains, correct any misaligned trains, and attend to any security incidents such as terrorist attacks or bomb threats by putting all personnel at the station at the disposal of the state police.

⁵Rodolfo González testified that ACI originally hired 26 Station Officials. In late 2004, the system demonstration tests shows that the number of Station Officials approved were insufficient to properly support the management of the train stations. In February of 2005, ACI recommended to the PRHTA a change order request to the parties' contract, and 18 additional Station Officials were hired. In May 2005 these new hires completed their three months' training program.

⁶ACI has contracted with St. James Security Inc. to provide security services, in addition to the state police assigned to the stations. Most of the day to day cleaning and maintenance services are contracted to Antilles Cleaning Services Inc. These two companies have approximately 200 employees assigned to the train stations.

The Employer operates 24 hours a day, seven days a week⁷. The train is open to the public from 5:00 a.m. to 11:30 p.m. There are a minimum of three Station Officials assigned to each station or group of stations, one per each work shift. No Station Official has authority over another Station Official. Station Officials are required to inform all occurrences at the station or business unit at the end of their shift. The Assistant Manager of Operations visits the train stations one or two times per week⁸. The entry level salary for a Station Official is \$26,000. If the employee meets or exceeds an 80% rating in his initial six months evaluation, the salary goes up to \$30,000. If the employee's evaluation rating is between 75% and 79%, the employee would receive a salary increase of \$2,000, and would be reevaluated in a period of six months. If his performance rating thereafter reaches 80%, his salary would be increased to \$30,000. Station Officials wear a white polo shirt, lime green reflective vest, black pants and safety shoes. They register their attendance by punching a time clock only at the beginning and at the end of their work shift. They do not get paid overtime.

The record shows that there is a minimum of three up to a maximum of nine Station Attendants per station. They are paid \$ 9.21 per hour, punch a time clock at the beginning and end of their work shift, and are also required to punch in and out to record their meal breaks. Station attendants get paid overtime, at double the regular hourly rate. They are required to wear a uniform, which consists of a gray polo shirt, black pants and safety shoes.

III. Discipline

The record shows that Station Officials have issued disciplinary memoranda and imposed suspensions on Station Attendants and Train Operators. Station Official Jorge Báez testified that he suspended Train Operator José Rodríguez because he was yelling, screaming and using loud profane language at work. After Báez made the decision to suspend, he reported it to the Transportation Supervisor. Human Resources Manager Florencio Polanco testified that this matter was resolved at the Department level. He further testified that the employee was paid for the missed work hours because at the moment of the suspension he was four hours into his eight hour work shift, and as per the Collective Bargaining Agreement, he had to be compensated for the full day of work.

The record also shows that Station Official Báez verbally admonished Train Operator Garcia because he wanted to leave work prior to finishing his

⁷It appears from the record evidence submitted that Station Attendants work the following shifts: 9:00 a.m. to 6:00 p.m.; 2:00 a.m. to 11:00 a.m.; 10:00 a.m. to 7:00 p.m.; 5:00 a.m. to 2:00 p.m.; 3:00 p.m. to 12:00 midnight; 4:30 p.m. to 9:00 p.m.; 7:00 p.m. to 12:00 midnight or, 1:00 p.m. to 10:00 p.m.

⁸General Manager Rodolfo González and Station Official Carmelo Acevedo testified that the Transportation Supervisors would visit the stations once or twice a week. These five Transportation Supervisors were recently replaced by two Assistant Managers, Pedro Adorno and Grisel Cruz.

assigned work shift. The employee filed a grievance against Báez, who responded in writing to the allegations. In addition, Station Official Báez also testified that he verbally reprimanded Train Operator Edwin Carrasquillo because of his poor job performance. Carrasquillo filed a grievance against Báez, who prepared a report answering the grievance. Human Resources Manager Florencio Polanco testified that he met with both Carrasquillo and Báez to discuss the incident, but the record is not clear if both these verbal warnings were ultimately rescinded, or what was the final outcome of the grievances filed against Station Official Báez.

The record further disclosed that Station Official Báez also suspended employee Robert Brown. The Union filed a grievance regarding the suspension imposed. When asked about this disciplinary action, Human Resources Manager Florencio Polanco testified that ultimately through the grievance and arbitration procedure the parties reached an undisclosed agreement. Therefore, the Petitioner argues that since the suspension was resolved, Station Official Báez did not have the authority to impose discipline. Polanco further stated that even though the suspension was not applied, the written disciplinary memorandum remains in the employee's personnel file.

In addition, the record shows various instances where Station Official Mildred García issued disciplinary memoranda to employees who had shown poor work performance, or incurred in insubordination or other violations of work rules. Mildred García testified that on one occasion she issued two disciplinary memoranda; on the same day, to a Station Attendant. The employee had previously been verbally disciplined for the same or similar conduct, but Station Official Garcia had opted not to issue a written disciplinary memorandum. The record shows that the disciplinary memoranda were issued without prior consultation or approval from her superiors, the decision to discipline was hers. The record evidence also shows that Station Official Mildred García was commended by General Manager Rodolfo González for the effective handling of a situation with a St. James Security employee. Station Official Mildred García had requested St. James Security to remove this employee from all of the train stations due to misconduct. This employee was removed from her post, and was asked to turn in her work I.D. badge.

IV. Assigning Work

In addition, the record also shows that Station Officials have granted employee requests to leave work early and for a day off. Station Official Báez testified that he has authorized a Train Operator's written request for a day off on his own authority and without consulting or seeking authorization from his supervisor. Regarding the assignment of overtime work, the record shows that if the need arises, Station Officials assign it according to a voluntary overtime list in order of seniority, as established by the Collective Bargaining Agreement, which has the names of those Station Attendants or Train Operators who have

volunteered to work overtime. The Union contends that Station Officials do not have the authority to assign overtime because the overtime list is monitored by the five Station Officials at the Transportation Department, not at each station. Further, the Union points out that the list located at each train station's booth does not contain the phone numbers of the Station Attendants or Train Operators. Regarding this, Station Official Mildred García testified that previously the five Station Officials at the Transportation Department managed the overtime list, but since the implementation of the new organizational structure at ACI, there is a list at each train station's control booth. García stated that even though the list does not contain the employees' phone number, she knows almost every attendant's phone number, and if she does not have it, then she will call one of the five Station Officials at the Transportation Department for that specific information.

V. Evaluations

Regarding the authority to evaluate employees, Station Official Mildred García testified that she had evaluated an undisclosed number of Station Attendants during the months of October or November of 2004, when their evaluations were due. The record shows that previous to being assigned to the Station Department, Station Official Mildred García was one of the five Station Officials assigned under the Transportation Department. During that time, she had the opportunity to evaluate between 15 or 25 Train Operators⁹. It appears, however, that these evaluations did not result in a promotion or salary increase; it shows that they were perfunctory and lacked any real effect or purpose. To that effect, Human Resources Manager Florencio Polanco testified that these employees did not receive a promotion or a change in compensation based on these evaluations, as changes in compensation are the result of the Collective Bargaining Agreement which mandates a pre-determined yearly wage increase for both Station Attendants and Train Operators¹⁰.

The record shows that Station Official Mildred García recommended Station Attendants Milagros Llanos and Silviana López for available positions as Train Operator. Her recommendations were adopted, and both López and Llanos were, after the required training, promoted to Train Operator, with the corresponding salary increase. Even though Human Resources Manager Florencio Polanco testified that these recommendations for promotions were "secondary", because they were not part of the required mid year or yearly evaluations, but instead consisted of unusual reports to other Station Officials and Supervisors, he corroborated that these two promotions were indeed granted. Station Official Mildred García further testified that during a meeting with General Manager Rodolfo González, she recommended two Train

⁹The record failed to show how long these employees had worked for the company and if the evaluations were the required mid year or yearly evaluations.

¹⁰The record shows that, contrary to the Station Attendants and Train Operators, Station Official's compensation is based on their performance or by seniority.

Operators for positions as Station Official. For undisclosed reasons, these employees had previously not been considered for the position but, after Garcia's recommendation, both were given the opportunity to begin training for, and later on became Station Officials.

VI. Directing Employees

In support of its position that Station Officials do not have the authority to responsibly direct the Station Attendants and Train Operators, the Petitioner points out the testimony of Station Official Roberto Suárez who stated that he does not consider himself a supervisor. It is important to note, however, that the record reflects that Suárez, in order to be considered for a higher position, had submitted his curriculum vitae to ACI General Manager Rodolfo González describing what he refers to as his supervisory duties and his experience as a Station Official. Further, the record shows that Station Official Roberto Suárez was verbally counseled by General Manager Rodolfo González for not supervising temporary personnel assigned to the stations to provide customer service. In addition, in his evaluation, Suárez was critiqued and admonished that he must work on enforcing procedures on the Station Attendants and Train Operators.

VII. Handling of Grievances

In support of its position that Station Officials are not supervisors, the Union also presented some testimony from witnesses to the effect that Station Officials have not been involved in the handling of grievances filed as mandated by the parties' Collective Bargaining Agreement¹¹ which states that grievances are to be presented at Step 1 to the employees' immediate supervisor. According to the record, Human Resources Manager Florencio Polanco testified that in the past, employees have submitted their Step 1 grievance either directly to him, to the designated Labor Relations employee, or have been deposited at a dedicated in-box at his office. The record evidence also shows that on occasion, the grievance has been submitted to a Station Official or to the former Transportation Supervisors, now Assistant Managers. Assistant Manager Grisel Cruz stated that either she or the Human Resources Department has handled the first meeting between the parties once a complaint is filed. Station Official

¹¹Petitioner currently represents the Station Attendants and Train Operators, having signed a Collective Bargaining Agreement on December 15, 2004. Included in the bargaining unit are all Warehouse employees, Train Operators, Station Attendants, Technicians I, II & III, Train Operator/Yard Master, OCC Technicians, ATO Technicians, General Helpers, Clerical, Track Laborers, Customer Service and Handymen. Regarding the grievance and arbitration procedure contained in the Agreement, Article 14 Section A, paragraph 1 states that if an employee or group of employees has a complaint, the complaint will be presented in writing by the Union delegate to the immediate supervisor on or before five (5) working days from the event that gave rise to such complaint. If it is not satisfactorily resolved within five (5) working days, the case will be then presented to the General Manager and Union representatives or the person designated by them for this purpose.

Báez' stated that when a grievance was filed against him challenging a disciplinary action imposed, he prepared a report of the incident addressing the grievance allegations.

VIII. Analysis

Under Section 2 (11) of the Act, a supervisor is any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. The types of supervisory authority are listed in the disjunctive, thus possession of any one authority is sufficient to establish supervisory status upon the individual. The exercise of this authority must be in conjunction with independent judgment in the employer's interest. Phelps Community Medical Center, 295 NLRB 486 (1989), American Commercial Barge Line Co., 337 NLRB 1070 (2002). It is well established that the burden of establishing supervisory status rests on the party asserting that status. NLRB v. Kentucky River Community Care, 532 U.S. 706 (2001), 121 S.Ct. 1861 (2001). Independent judgment is defined by the Board as judgment the use of which requires that it be exercised beyond the routine and clerical.

I have analyzed the appropriateness of the petitioned-for-unit under the above mentioned legal principles.

In assessing the status of the disputed classification, I note that, with respect to employee discipline, Station Officials have the authority to issue, at their discretion, disciplinary memoranda or verbal reprimands of infractions to company rules and regulations. The record evidence shows that Station Official Mildred García issued various written disciplinary memoranda to a Station Attendant after verbally disciplining the same employee for similar infractions. These disciplinary actions or memoranda are placed in the employee's personnel file and constitute the first step in the process for possible progressive discipline. Further, Station Official Báez testified that he issued verbal reprimands and suspended a number of Train Operators. In Wilshire at Lakewood, 345 NLRB No. 80 (2005) the Board held that the exercise of independent judgment in initiating an employer's disciplinary process constitutes a substantial role in the decision to discipline, and is indeed indicative of supervisory status. See also Progressive Transportation Services, 340 NLRB 1044 (2003). The Union contends that the suspensions imposed by Station Official Báez do not demonstrate the Station Official's authority to effectively impose discipline since the matter was resolved and, the employees did not suffer an adverse economic impact from the suspension. It appears from the record, however, that, in regards to Train Operator José Rodríguez' discipline, the economic effects of the suspension were not imposed because the Employer had to abide by the

Collective Bargaining Agreement's dispositions. The record does not reflect if the employee's personnel file was expunged, or if the discipline imposed was nullified. Regarding Robert Brown's suspension, it is clear that the disciplinary memo issued remains in his personnel file. Even though the discipline imposed by these Station Officials did not necessarily lead to further disciplinary action in every instance, or the matter was eventually resolved, the fact remains it plays a significant part in the disciplinary process, and they are initiated by the Station Official's independent determination that the committed infraction is serious enough to warrant the imposed discipline. In these circumstances, the imposition of discipline clearly shows the Station Official's supervisory status.

With respect to the authority of Station Officials to effectively recommend promotions, as noted above, Mildred García recommended two Station Attendants for available positions as Train Operator. García also recommended two Train Operators for positions as Station Officials. The Petitioner contends that these recommendations were adopted just because there were positions available which needed to be filled. Notwithstanding the Employer's need or lack thereof of available personnel to fill any vacancies, the fact remains that Station Official Mildred Garcia's recommendations were welcomed and implemented, and its final outcome was that the employees were granted the promotions.

As to Station Officials granting permission to leave work early or to change shifts, even though the evidence submitted was limited in this respect, it nevertheless shows that the employees sought the Station Officials permission, and he exercised independent judgment in granting the request. The Petitioner argues that Station Official Báez is not a supervisor because he has exercised his supervisory authority infrequently during the past year.¹² The record shows that even though Báez has been a Station Official since August of 2002, it was in January of 2005 that the "Tren Urbano" began offering services to the public. The fact that the record shows limited instances where a Station Official granted permission to leave work or to grant requests for a change in work shifts is not a reasonable basis to conclude that the authority was lacking. The Board has held that the frequency in which independent judgment is exercised is not the test for determining whether supervisory responsibility is involved. It is sufficient that the responsibility assigned calls for the exercise of such independent judgment on occasion. White Sulfur Springs Company, 216 NLRB 721 (1975).

The record evidence also shows that Station Officials have the authority to responsibly direct Station Attendants and Train Operators. To be responsible is to be answerable for the discharge of a duty or obligation. In determining whether direction in any particular case is responsible, the focus is on whether the alleged supervisor is held fully accountable and responsible for the performance and work product of the employees he directs. Record evidence

¹²The Petitioner also argues that Station Officials only spend approximately 2% of their work time performing supervisory duties. Notwithstanding, Petitioner did not present any evidence to sustain this allegation.

shows that Station Official Suárez¹³ was reprimanded for not effectively directing the work of Station Attendants, and in his evaluation, he was critiqued and admonished to work on enforcing company procedures on Station Attendants. In this case, the evidence shows that Station Officials are held accountable for the performance and work of Station Attendants and Train Operators. Accountability for another's failure to perform a duty establishes an employee's power to responsibly direct. American River Transportation Co., 2001 WL 160363 (NLRB Div. Of Judges).

With respect to Station Officials authority to adjust grievances, the Union asserts that the Collective Bargaining Agreement in effect which covers both Station Attendants and Train Operators requires that the grievance initially shall be presented by the Union's delegate to the employee's immediate supervisor. Therefore, the Union argues, since the Transportation Supervisors, now Assistant Managers, have been involved in this initial step, Station Officials are not the Station Attendants' and Train Operators' immediate supervisors. Nevertheless, the record shows that when a grievance was filed against Station Official Báez challenging a disciplinary action imposed, he prepared and submitted a report of the incident, making this initial Step I meeting between the parties unnecessary and futile.

In addition, Station Officials possess several secondary indicia of supervisory authority. The Board has held that non-statutory indicia, such as the ratio of alleged supervisors to employees, and differences in terms and conditions of employment, can be used as background evidence on the question of supervisory status but are not themselves dispositive of the issue in the absence of evidence indicating the existence of one of the primary or statutory indications of supervisory status. See Training School of Vineland, 332 NLRB 1412 (2000). In the instant case, the evidence shows that there is a substantial difference in the terms and conditions of employment between Station Attendants, Train Operators and Station Officials. Station Attendants and Train Operators are hourly paid employees, are paid overtime, and are entitled to a 401K retirement plan as per the Collective Bargaining Agreement, contrary to Station Officials who receive a monthly salary, and no retirement plan. The Employer asserts that if Station Officials are found not to be supervisors, there would be only two Assistant Managers and one Alternate Assistant Manager, located at the Employer's Main Building, who visit the stations once or twice a week, supervising 44 Station Officials, 118 Station Attendants and 51 Train Operators, with no supervisors in charge at the Tren Urbano stations. This ratio of supervisors to non-supervisory employees is unrealistic. American River Transportation Co., supra; Pennsylvania Truck Lines, 199 NLRB 641 (1972).

¹³While Station Official Suárez stated he does not consider himself a supervisor, the Board has held that factors such as if the individual considers himself a supervisor is considered a secondary factor in determining supervisory status.

In view of the above facts, I find that Station Officials do possess supervisory authority within the meaning of Section 2 (11) of the Act.

Accordingly, as I have found that the Station Officials sought herein are supervisors within the meaning of Section 2 (11) of the Act, I shall dismiss the Petition.

ORDER

It is hereby **ORDERED** that the petition filed herein be, and it is hereby **DISMISSED**.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by February 6, 2006.

Dated at San Juan, Puerto Rico this 23rd day of January, 2006.



/s/

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